March 10, 1984. Under Order 46 and Order 47 of the Rules of the High Court, 1980, the plaintiff as judgment creditor may execute the judgment by attaching the property belonging to the defendant. Even if the subject matter on which the judgment creditor intends to execute judgment is under a lien, it does not preclude the judgment creditor from attaching the same in respect of his claim. See *The James W. Elwell, supra,* and *Proctor* v. *Nicholson, supra.*

Since the execution was lawful, payment for the execution expenses should have priority over any other claim, including the claimant's claim. In *The Mons,*[10] Langton J. stated the order of priority as follows:

"The order of priority will therefore be as follows: (i) the costs of the arrest up to the date of the order for sale; (ii) the crew's wages subsequent to salvage; (iii) the master's wages and disbursements subsequent to salvage; (iv) the salvage award and costs; (v) the crew's wages and disbursements of the two masters before salvage."

One learned commentator has also stated that "Marshal's charges, expenses, etc. are...paid in priority to all claims..." See *K.C. McGuffie*, British Shipping Laws, 1964, vol. 1. p. 742.

In the instant case all execution expenses from the date of attachment to the date of sale should first be deducted from the proceeds of the sale. The balance of the money will go the claimant.

For the reasons stated above, any decision is as follows:-

(1) I confirm the decision of the Senior Assistant Registrar that the claimant has a lien over the fifteen horses.
(2) The claimant is entitled to the proceeds of the sale of the said horses after all execution expenses from the date of attachment, March 10, 1984 to the date of sale, April 9, 1984, have been deducted.
(3) The plaintiff will pay the costs of this appeal to the claimant.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Murphy & Dunbar.*

BRUNEI REPORTS

POLYNESIA OFFSHORE SUPPLIES (B) BHD. v. AWANG DAMIT & ANOR.

[O.C.J. (Roberts C.J.) February 4, 5 & 6, 1985]
[Bandar Seri Begawan – Suit No. 213 of 1984]

Contract – Goods sold and delivered – Balance of account – Erroneous invoices – Replacement invoices – Whether defendants contracted with plaintiff or another company.

The plaintiff, a Brunei limited company, sued the defendant firm ("ADM") for the sum of $550,740.06, being balance due to the plaintiff for goods supplied to it at its request. The goods supplied were shipped on various dates between October 25, 1982 and October 24, 1983 and invoices and bills of lading were produced in evidence. The defendants were awarded three contracts with Brunei Shell for the supply of chemicals. The plaintiff was to supply the goods to the defendants, who would then remit to the plaintiff any payments which they received from Brunei Shell. The plaintiff's main witness was one Mr. Kwok, a director both of the plaintiff, Polynesia Offshore Supplies Brunei ("the Brunei Company") and Polynesia Offshore Supplies S.B. ("the Sarawak Company"). The plaintiff company through its new accountant Mr. Chung subsequently discovered that 19 invoices were erroneously issued in the name of the Sarawak Company instead of the Brunei Company. Also the prices were too low. Accordingly, Kwok telephoned the manager of ADM (the defendant firm) asking him to disregard the 19 erroneous bills and telling him that these would be replaced with a fresh set of invoices under the Brunei Company's letterhead. Kwok said that the manager agreed and soon thereafter Chung forwarded a new set of invoices in the name of Brunei Company to the defendants. No written confirmation of the telephone call was sent to ADM. The defence did not dispute the amount claimed. The defendants said they purchased the goods from the Sarawak Company, not from the Brunei Company. The issue is with whom was ADM in contract. In favour of the defendants are the 19 invoices in the name of the Sarawak Company. But, against the defendants, Mr. Shawaludin as managing director of ADM, wrote a letter to Brunei Shell authorizing it to make payments to the Brunei Company.

Held: (1) the plaintiff has established that all the transactions relating to the three Shell contracts took place, so far as ADM is concerned, with the Brunei Company (the plaintiff), and not with the Sarawak Company;

(2) the plaintiff is entitled to payment for $550,740.06 with costs and interest at 6% from judgment till payment.

CIVIL SUIT.

M. S. Sandhu and *Daljit Singh* for the plaintiff.
Susanna Lim and *Oliver Phipps* for the defendants.

Cur. Adv. Vult.

Roberts C.J.: The plaintiff is a limited company, incorporated under the Brunei Companies

Enactment and having a registered address in Bandar Seri Begawan. The defendants are a Brunei firm trading under the name of Sharikat Awang Damit Mahmud ADM, which I refer to as "ADM", with it ~ffice in Seria.

The plaintiff claims a sum of $550,740.06, which is said to be the balance due to the plaintiff from the defendants, for goods which were supplied by the plaintiff to the defendants, at the latter's request.

According to the pleadings, the goods which were supplied to the defendants were shipped on various dates between October 25, 1982 and October 24, 1983. The invoices for these shipments were produced in evidence, as were the bills of lading which supported them.

Plaintiff's case

The background to this dispute is that, in 1982, the defendants had been successful in securing three contracts with Brunei Shell for the supply of three varieties of chemical.

The Statement of Claim avers that the plaintiff was to supply the goods to the defendants, bearing all the costs and expenses involved. The defendants would then remit to the plaintiff any payments which they received from Brunei Shell under the three contracts.

This arrangement continued smoothly until nine cheques, which were drawn by the defendants, in favour of the plaintiff, were not met by the bank, on which they were drawn, between April and June 1984. The face value of the cheques amounted, in all, to $710,000/–. Notice of dishonour was given in respect of five of them, totalling $300,000/–, by telex sent by the plaintiff to ADM.

The plaintiff called, as its main witness, Mr. Stanley Kwok, who was a director, both of Polynesia Offshore Supplies Brunei, the plaintiff, and of Polynesia Offshore Supplies S.B., a sister company registered in Sarawak. For the purposes of identification, I will refer to these two companies as "the Brunei Company" and "the Sarawak Company".

The Sarawak Company had been formed about 1976 in order to sell offshore oil supplies to Shell in Sarawak. The Brunei Company was formed in August 1982 to obtain similar business in Brunei.

In May 1982, an agreement was entered between Caruso Enterprises, a Hong Kong registered company, and ADM. Mr. Kwok signed on behalf of Caruso Enterprises; and Mr. Shawaludin, the husband of the second defendant who is one of the co-proprietors of ADM, signed for and on behalf of ADM of which he was, and still is, manager.

This agreement recited that Caruso and ADM wished to establish a company, known as Polynesia Offshore Supplies Brunei Limited, in Brunei. If such a company was formed, it was intended that 50% of the shareholding should be held by Caruso, 20% by ADM and 30% by a third party, yet to be identified.

In furtherance of this agreement, Mr. Kwok said, Polynesia Offshore Supplies Brunei Limited was formed in August 1982 and registered as a company. Among the directors shown on the return, filed in the company's registry, were Mr. Kwok and Mr. Shawaludin.

The return of the allotment of shares, which was dated November 1, 1983, shows that Hamidah Damit, the second defendant, was the registered owner of 10,000 shares.

A "shareholder's agreement", establishing the Brunei Company as the joint venture company to carry out contracts for the supply of chemicals, was signed by the second defendant and Mr. Stanley Kwok.

The main objective of the Brunei Company was to secure for itself the contracts which ADM had secured and any similar business in Brunei. These transactions would be financed by Caruso Enterprises, a Hong Kong company, which would purchase the supplies ordered by Shell and would consign them to the defendants, invoicing the Brunei Company for them. The Brunei Company, in its turn, would issue invoices in its name to ADM.

According to Mr. Kwok, Caruso, having purchased the raw material in Singapore, would bill the Brunei Company with the tender price *i.e.* the price which was ultimately to be paid by Shell to ADM, less 2½%, which was to constitute the Brunei Company's profit. The Brunei Company would receive from the defendants, ADM, the full amount, which Shell had paid to ADM, as the nominal supplier under the contracts.

The replaced invoices

A new accountant, Mr. George Chung, was appointed by the plaintiff company in June 1983. He discovered that there had been two serious errors in the invoices issued to the defendants. First, 19 invoices had been issued in the name of the Sarawak Company, instead of in the name of the Brunei Company. Secondly, the prices inserted in the Sarawak invoices were too low.

The accounting and administration of both the Brunei and Sarawak companies is conducted in the same office in Singapore. Mr. Kwok's theory is that the wrong invoices were sent out because of a muddle by the clerks, who both used invoices with the wrong heading and included the cost price, which Caruso had paid for the materials, instead of the tender price (less 2½%).

Mr. Kwok said that, when the errors were drawn to his attention by Mr. Chung, he telephoned Mr. Shawaludin, the manager of ADM; asking him to disregard the 19 wrongly headed and inaccurate invoices and telling him that these would be replaced with a fresh set of invoices under the Brunei Company's letterhead. This, according to Mr. Kwok, Mr. Shawaludin agreed to do. Soon thereafter, according to Mr. Chung, a new set of invoices, in the name of the Brunei Company, was forwarded to the defendants.

So far as the plaintiff is concerned, all future consolidations and accounts were conducted on the basis of the new invoices issued in the name of the Brunei Company and not on the basis of those issued in the name of the Sarawak Company.

Unfortunately, as Mr. Kwok agreed, no written confirmation of his telephone call with Mr. Shawaludin was sent to ADM; nor did he have any conversation about this matter with Hamidah.

Mr. Chung said that he had drawn up an account, which set out the current financial situation, as between the plaintiff and the defendants, and that this is fully and accurately represented in the appendices, P1 and P2, to the Statement of Claim.

He confirmed that he has been dealing with the accounts of both the Brunei and the Sarawak companies, since he joined them in June 1983. It was he who discovered that the Sarawak invoices had been issued to ADM in error and drew Mr. Stanley Kwok's attention to this.

He further testified that in March 1984, he prepared a summary of accounts which had been submitted to the defendants. This summary showed the then outstanding indebtedness of ADM to the plaintiff and was based on the revised invoices and not on the original ones.

The defence, as it had been pleaded, is a very simple one. It does not seek to dispute the amount claimed, either generally, or in detail. What it says is that, while the defendants admit to having purchased goods of the kind with which the claim is concerned, they did so from the Sarawak Company and not from the Brunei Company at all. Consequently, they owe nothing to the Brunei Company, though the defendants conceded, during the course of the trial, that they are owing about $320,000/– to the Sarawak Company, with which they say they had been in contractual relationship throughout.

Hamidah, one of the two owners of the defendant firm, asserted that the arrangement agreed between ADM and Mr. Kwok was that the chemicals should be supplied to Shell through the Sarawak Company, not the Brunei Company.

She admitted that payments were made to the credit of the Brunei Company's bank account, but said that this was at the request of the directors of both the companies, and was no more than an accounting arrangement and a convenient way of paying debts owed by the defendants to the Sarawak Company.

It was not until May 1984 that she realised that two sets of invoices for the same shipments at different prices had been issued. When she discovered this, she instructed her accountant, Mr. Masri Barum, to clarify the position, but he failed to do this.

She really knew very little about the details of the way in which ADM's three contracts with Shell were to be carried out. These were matters which she left to Masri and to Mr. Shawaludin.

When Shell paid the defendants, this money was remitted, until May 1984, to the Brunei Company's account, but when she discovered that there were two sets of invoices, she stopped payment of cheques because she believed that it was the lower charge that was the correct one for ADM to meet. However an examination of the cheques themselves shows that only one of the cheques bears the mark "Stop" and that the other 8 cheques are

marked "Refer to drawer", which usually indicates that there are insufficient funds in an account to meet the cheque which is drawn on it.

She said that the main communication about the carrying into effect of Shell contracts was between the accountants, Masri and Mr. Chung. When she signed the accounts, which were drawn up by Mr. Chung in March 1984, as correct, she did so to get rid of him because he kept bothering every one in her office. She did not read what she was signing and did not know what was in the document. The other signature on the document is that of Masri, whom she agreed ought to have known whether the accounts were correct or not.

She was supported, to some degree, by Mr. Shawaludin, her husband, manager of ADM, and a director of the Brunei Company. He agreed that he had been originally approached by Mr. Kwok, who wanted to take over the supply of chemicals to Shell and that, in order to give effect to this, the original agreement produced as P1 was signed between him and Mr. Kwok.

He says that there was a verbal agreement between him and Mr. Kwok, that all the materials to be supplied to Shell should be purchased from the Sarawak Company. He was unable to produce any documents to support this assertion, though it is true to say that the plaintiffs have also failed to produce any written confirmation of their version of the arrangements between the plaintiff and the defendants. When asked about it, Mr. Shawaludin said that it was a gentleman's agreement between him and Mr. Kwok, representing the Sarawak company.

He added that there was also a verbal agreement that ADM would be repaid the cost of warehousing and transport. He had no documents to support that either. However, there were produced in evidence, schedules showing that substantial sums had been paid by the Brunei Company for warehousing, storage, transport and handling charges of the goods being supplied to Shell by ADM.

He insisted that, throughout, ADM was dealing with the Sarawak Company only. He thought that there had been some payments made directly to the Sarawak Company, but he was unable to produce any documentary evidence to support their assertion.

He said that later on, at the insistence of the directors of both companies, he arranged for all credits due to the Sarawak Company to be paid into the Brunei Company's account.

He also only discovered the double invoicing in May 1984. He denied that he received any phone call from Mr. Kwok in June 1983, though I must observe that Mr. Kwok was not challenged about this when he gave evidence.

With whom did ADM contract

The only real issue that I have to decide, in view of the state of the pleadings, is with whom was ADM in contract? Was it the Brunei Company, or the Sarawak Company?

In favour of the defendants' contention are the 19 invoices issued by the Singapore office and standing in the name of the Sarawak Company. There is no other documentary evidence which refers directly to the Sarawak Company. There are 13 invoices issued in the name of the Brunei Company.

With the exception of the payments which Mr. Shawaludin says were made to the Sarawak Company at an early stage, an assertion which is backed by no documents, it is clear that all payments, whether they may have been due to the Sarawak Company or to the Brunei Company, were made to the Brunei Company's account.

When the invoices were replaced about June 1983, copies of all of them were sent by Caruso Enterprises to the Brunei Company's offices. All show the Brunei Company as the consignee. The covering letter was dated April 4, 1983.

Some significance also should be attached to the Novation Agreements, which were abortive attempts, in December 1983, to substitute the Brunei Company for ADM as the nominal suppliers to Shell.

A covering letter, forwarding to Shell the draft novation for Shell's approval, is signed by Mr. Shawaludin as managing director of ADM. In his covering letter, he says

> "We, Sharikat Awang Damit Mahmud, hereby authorise Brunei Shell Petroleum Co. to pay or remit all payments due under the above-mentioned contract to Polynesia Offshore Supplies (B) Ltd. at its account with The Chartered Bank in Bandar Seri Begawan."

If the Sarawak Company had been the true

supplier of the materials, it would have been expected that the novation would have been in favour of that company and not of the Brunei Company. The only other possible explanation, which Mr. Shawaludin denied, is that if the Sarawak Company was the true supplier, it was necessary to mislead Shell into thinking that the true supplier was a Brunei Company, because a Brunei concern might be acceptable to Shell whereas an oversea supplier might not have been.

I would prefer to adopt the simpler and more obvious explanation, which is, that it was intended that the Brunei Company should be the assignee because this was a recognition of reality, in other words, that it was the Brunei Company that had been supplying the goods.

Weight must also be given to the consolidation of accounts, prepared in April 1984 by Mr. Chung, which is to be found at pages 118 to 122 of the Bundle. The consolidation is based upon the charges made in the replacement invoices, issued in the name of the Brunei Company.

Hamidah explained her signature and approval of these accounts by saying that she did it because she was being harrassed by Mr. Chung and wanted to get him off her back. Even assuming that this was so, and that she was prepared to sign such an important document, which assessed the liability of her firm at almost ¾ of a million dollars, without checking its contents and because of pressure, there is nothing to suggest that any such motives were at work in the minds of ADM's accountant, when he signed the consolidated account as correct.

The signing of an account, by a firm's accountant, in the absence of any evidence to the contrary, must be seen as being within his authority and as binding the firm which employed him.

I therefore see this as a recognition in March 1984 by the defendant that the sum stated therein was due from ADM to the Brunei Company, since the consolidation is headed "Outstanding Payments by ADM to P.O.S.B."

I accept the evidence of Mr. Kwok and Mr. Chung that the defendants, through Mr. Shawaludin, were informed, about June 1983, that there had been a mistake in the invoices, which had been issued in the name of the Sarawak Company.

Whatever view is taken of the evidence, it is clear that from July 1983 onwards, invoices were only issued in the name of the Brunei Company, yet payments continued to be made by the defendants until about May 1984 when their cheques were stopped. This the defendants' witnesses seek to explain by saying that the two invoices are very similar and that they never noticed that they came from different sources until May 1984.

I am entirely satisfied that the Brunei Company was not merely a paper company, as has been suggested by the defence. It was an active company, involved in a number of transactions, as can be seen from an examination of its bank accounts which were included in the bundle.

Nor does the payment of $3,000/– to Mr. Shawaludin, by way of what he calls "expenses", suggests a company which is a paper fiction. I assume he was doing something in return for his money and this would indicate that the company itself was not inactive.

The plaintiff has established, in my view, that all the transactions relating to these three Shell contracts, took place, so far as ADM is concerned, with the Brunei Company, not with the Sarawak Company at all.

Counsel for the plaintiff argued that it was not for me to decide the extent to which the claim of the plaintiffs had been established. The pleadings are limited entirely to a denial that whatever debts were owed by the defendants were not owed to this plaintiff. There was, he said, nothing in the pleadings which disputed the amounts which had been claimed. This is, in my view, correct. The defendants' case has to stand or fall on the identity of the person with whom the plaintiff was in contract, which was, I find, the defendants.

Had it been necessary for me to do so, I would have found that the price due from the defendants to the plaintiff was the tender price from Shell, and not the lesser price, which appeared in the earlier invoices which were replaced.

I accept the plaintiff's witnesses' evidence that the full tender price was to have been passed by the defendants to the Brunei Company; and that the defendants would have profited by way of the amounts which have been paid to Hamidah, on a distribution of the profits of the Brunei Company, by virtue of her 20% shareholding in it.

As I have said, I am not called upon to decide that, but I have indicated how I would have deci-

ded, had it been necessary, in case the matter should become an issue in the future.

The plaintiff is entitled to judgment for $550,740.06. In view of that, it is not necessary for me to make any order on the second prayer relating to the dishonoured cheques.

The plaintiff to have costs, to be taxed, if not agreed.

Interest at 6% from date of judgment till payment.

Claim allowed.

Solicitors: *Sandhu & Co.; Susanna Lim & Co.*

MAHDINI BIN MUSTAPA v. PUBLIC PROSECUTOR

[A. Cr. J. (Bewley J.) November 26, 1984]
[Bandar Seri Begawan – Criminal Appeal No. 4 of 1984]

Criminal Law and Procedure – Appeal against sentence – Appellant, 17, pleaded guilty – Offence of unlawful carnal knowledge – No compulsion or undue influence – Appellant unemployed had wife and child – Whether magistrate's decision should be interfered with – Unlawful Carnal Knowledge Enactment (Brunei Cap. 29), s. 2 – Criminal Procedure Code, s. 262.

The appellant, 17, pleaded guilty to two charges of unlawful carnal knowledge of a girl under 16 years of age under section 2 of the Unlawful Carnal Knowledge Enactment, amended in 1981 to provide for a minimum sentence for this offence of not less than two years' imprisonment plus not more than 12 strokes of the cane in the case of an offender under the age of 18. The offence took place on successive nights. There was no suggestion of compulsion or undue influence on the part of appellant, who was unemployed and had a wife and child. He appealed against sentence.

Held, dismissing the appeal: the magistrate was right in deciding that section 262 of the Criminal Procedure Code had no application. There was no reason to interfere with his decision regarding the number of strokes imposed.

CRIMINAL APPEAL.

Appellant in person.

Dk. Zabaidah bt. Pg. Kamaludin (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Bewley J.: This is an appeal against sentence. The appellant pleaded guilty to two charges of unlawful carnal knowledge of a girl under 16 years of age under section 2 of Cap. 29. He was sentenced to imprisonment for two years and to two strokes of the cane.

Section 2 of The Unlawful Carnal Knowledge Enactment was amended in 1981 to provide for a minimum sentence for this offence of not less than two years' imprisonment plus not more than 12 strokes of the cane in the case of an offender under the age of 18.

This appellant is 17. The victim was five months short of her 16th birthday. The offences took place on successive nights. There was no suggestion of compulsion or undue influence on the part of the appellant. The matter only came to light when the girl's father reported to the Police that she had failed to come home.

The appellant is unemployed and, rather surprisingly, has a wife and child.

On these facts the magistrate, I dare say, might have been tempted to take a lenient view of the matter, but for the provisions of the amended section 2. He decided, rightly, that section 262 of the Criminal Procedure Code, which deals with the non-custodial treatment of youthful offenders, had no application. It is a general provision and, therefore, must be read subject to the specific terms of Cap. 29.

His only discretion lay in the number of strokes. He might have ordered only stroke, not two. He doubtless had regard to the maximum of 12 strokes and took the view that this was not a case for the imposition of the absolute minimum sentence. I see no reason to interfere with his decision.

The appeal is dismissed.

Appeal dismissed.